



3138 10th Street North
Arlington, VA 22201-2149
703.522.4770 | 800.336.4644
f: 703.524.1082
nafcu@nafcu.org | nafcu.org

National Association of Federally-Insured Credit Unions

December 2, 2022

Melane Conyers-Ausbrooks
Secretary of the Board
National Credit Union Administration
1775 Duke Street
Alexandria, VA 22314

RE: Member Expulsion Bylaws Amendment (Docket No. NCUA-2022-0132)

Dear Ms. Conyers-Ausbrooks:

On behalf of the National Association of Federally-Insured Credit Unions (NAFCU), I am writing in response to the Notice of Proposed Rulemaking (NPR) issued by the National Credit Union Administration Board (Board), regarding the proposal to amend the standard federal credit union (FCU) bylaws (FCU Bylaws) to adopt a policy by which a FCU member may be expelled for cause by a two-thirds vote of a quorum of the FCU's board of directors. NAFCU advocates for all federally-insured not-for-profit credit unions that, in turn, serve 133 million consumers with personal and small business financial service products. NAFCU and its member credit unions appreciate the opportunity to provide input on this NPR and urge the Board to adopt a realistic member expulsion policy that avoids overly burdensome requirements, provides clear guidelines, and prioritizes the safety and welfare of credit union staff and boards of directors. Specifically, the Board should: 1) avoid including requirements in the final rule that are not found in the Credit Union Governance Modernization Act (CUGMA), such as the right for a member to appeal their expulsion; 2) provide clarity around the notice requirements and equitably distribute the burden of ensuring receipt of the notice and request for hearing; and 3) allow the option for in-person, virtual, or on-the-papers hearings, at the discretion of a credit union's board of directors.

General Comments

Under the Federal Credit Union Act (FCU Act) and standard FCU Bylaws, there are currently only two ways a member may be expelled: (1) A two-thirds vote of the membership present at a special meeting called for that purpose, and only after the individual is provided an opportunity to be heard; and (2) for non-participation in the affairs of the credit union, as specified in a policy adopted and enforced by the board.¹

¹ 12 U.S.C. 1764 (2022); 12 CFR part 701, App. A. Section 108.

The FCU Bylaws were last amended by the NCUA Board in 2019 (2019 Bylaws Final Rule).² The 2019 Bylaws Final Rule was clear that actions such as violence against other credit union members or credit union staff in the credit union facility or the surrounding property warrant immediate limitation of services or access to credit union facilities. Even a member deemed not in good standing, however, retains fundamental rights as a credit union member. For example, a member not in good standing has the right to attend, participate in, and vote at the annual and special meetings of the members and the right to maintain a share account.³ Those rights may only be terminated through a member's expulsion.

In March 2022, Congress enacted CUGMA to revise the FCU Act procedures for expelling members.⁴ Through CUGMA, Congress modified the FCU Act to provide FCUs with an option for expelling a member for cause by a two-thirds vote of a quorum of the board of directors. NAFCU has repeatedly requested NCUA action to provide much-needed relief to FCUs in handling members who are violent, disruptive, or who engage in criminal behavior. NAFCU was supportive of the passage of CUGMA and appreciates the NCUA heeding NAFCU's call to quickly implement the law.

Applicable Law

Throughout the proposed rule, the Board appears to search for ancillary authorities, outside of CUGMA or the FCU Act, to rely upon when creating additional requirements for the member expulsion process. For instance, in one of the questions listed in the proposed rule the Board states: "the Board solicits comments on whether fairness or other principles *or other law* may call for an in-person hearing."⁵ Congress passed CUGMA with the support of credit unions, and NAFCU urges the Board to focus on relevant law and avoid complicating the implementation of a straightforward piece of legislation with overly burdensome regulation.

The Board's discussion of the term "hearing", appears to reveal a fundamental misapprehension. In the proposed rule, the Board references an article, written by the Research Director of the Administrative Conference of the United States (ACUS), concerning how *federal agencies* may use new technologies to hold hearings.⁶ The ACUS is an independent agency of the United States government that was created to "promote improvements in the efficiency, adequacy, and fairness of the procedures by which *federal agencies* conduct regulatory programs, administer grants and benefits, and perform related governmental functions."⁷ But credit unions, even Federal Credit Unions, are not federal agencies. The Board is proposing an expulsion policy for credit unions as though it were writing it for the NCUA itself. Federal credit unions are governed

² 84 FR 53278 (2019).

³ Assuming there is no restraining or protective order from a court in place.

⁴ Pub. L. 117-103 (2022).

⁵ 87 FR 59740 (October, 2022).

⁶ 87 FR at 59748, footnote 13.

⁷ See ACUS, "Administrative Conference Act" (November 12, 2010) available at <https://www.acus.gov/publication/administrative-conference-act>.

by the FCU Act, not the Sunshine Act, and the Board should not propose regulations as though they were.

In that vein, it is important to note that due process, while important, is not generally appropriate in the context of a credit union's member expulsion policy. Due process is intended to provide the proper procedures in court proceedings and similar venues. It is not practical to require a credit union to engage in the same procedures as court proceedings, which can often take years to resolve. Furthermore, expenditure of staff hours and the expertise that would be required to conduct these types of proceedings would be prohibitive. The proposed rule introduces requirements, not found in CUGMA, that would turn the expulsion process into something closer to the due process afforded a student facing expulsion at a public university,⁸ than the termination of a consumer finance relationship.

Impact of Disruptive or Abusive Members

CUGMA was passed, after years of advocacy from credit unions, to address an ongoing, quantifiable threat to credit union staff and to the credit union industry as a whole. Credit unions and their staff are forced to interact with, and keep as members, individuals who perpetrate a staggering variety of criminal and non-criminal acts that endanger staff, disrupt credit union operations, and weaken the community-based nature of credit unions. These include violent criminal acts like physical assaults or robberies. They include non-violent crimes such as fraud. And they include non-physical attacks such as verbal abuse and sexual harassment.

Adding urgency to the issue, the problem appears to be getting worse, not better. Many of NAFCU's member credit unions have reported an increase in abusive and disruptive behavior by their members in the past several years as COVID-19, and accompanying safety protocols, have waxed and waned. This breakdown of the social contract is not limited to consumer financial services. A 2021 interview in the Harvard Gazette analyzes the problem:

“Now, news stories about angry customers behaving badly over minor inconveniences — diners berating wait staff over slow service or menu shortages, shoppers upset over hard-to-find items, and airline passengers refusing to comply with flight attendant directives about safety protocols — have become a near-daily occurrence. The Federal Aviation Administration has more than 3,400 unruly passenger reports on file so far for 2021, sparking 555 investigations; by comparison, just 146 investigations were initiated in all of 2019. And a recent poll of food service workers found 39 percent were quitting over concerns about

⁸ Norval GOSS et al., Appellants, v. Eileen LOPEZ et al., 419 U.S. 565 (1975).

hostility or harassment from customers, and 80 percent had either witnessed or experienced such behavior over COVID safety protocols.”⁹

Nor is the uptick limited to rude or unruly behavior. Violent crime is also experiencing a resurgence. A survey of 70 major police agencies found that violent crime such as robberies and aggravated assault spiked in the first six months of 2022 compared to the same period last year, with 236,962 incidents reported versus 226,967.¹⁰ This is also true for non-violent crimes like fraud, or friendly fraud—e.g., fraud where a member facilitates a fraudulent chargeback while retaining the benefit of the transaction. In NAFCU’s October 2022 Economic and CU Monitor Survey, over the past one to two years, 42 percent of respondents observed a significant increase in friendly fraud, and 32 percent saw a moderate increase.¹¹

Though the vast majority of credit union members continue to live up to their commitments in the membership agreement and contribute to a strong credit union industry, the violations committed by the small minority of abusive or disruptive members have a serious impact. The most apparent impact is on time and money expended to prevent or address unacceptable behavior. NAFCU’s member credit unions report an increase in staff hours needed to monitor and track disruptive or abusive members as well as to catch friendly fraud attempts.¹² They report increased costs associated with hiring security guards, where before there was no need. Legal fees have gone up as credit unions must address problem members through the court system. Just as costs are going up, some credit unions are reporting increases in account closures stemming from a perceived danger due to problem members. An upstanding credit union member who sees another member acting violently or abusively in a branch likely assumes that the problem member would be expelled from the credit union. But if that upstanding member sees the same problem member permitted to attend the annual meeting, they would rightly be concerned about their credit union’s commitment to keep its members safe. Finally, the increasing losses to credit unions caused by friendly fraud further weakens the credit union system and Share Insurance Fund.

Despite the genuine problem that the aforementioned losses present to credit unions, the most pressing issue for credit unions is the impact on staff. No one should have to go into work in fear for their safety or well-being. And yet time and again, NAFCU has heard these very concerns from our members. Members report that “the impact of abusive and disruptive members impacts the frontline staff more than anyone else. The employee becomes visibly upset to the point where they cannot continue to work. They have to step away from their station or office and on occasion

⁹ See Harvard Gazette, “Why all the abuse of servers, flight staffs, sales clerks as COVID rules ease?” (July 20, 2021) available at <https://news.harvard.edu/gazette/story/2021/07/harvard-business-professor-analyzes-bad-customers>.

¹⁰ See Major Cities Chiefs Association, “Violent Crime Survey – National Totals” (August 2, 2022) available at <https://majorcitieschiefs.com/wp-content/uploads/2022/08/MCCA-Violent-Crime-Report-2022-and-2021-Midyear.pdf>

¹¹ See NAFCU, Economic and CU Monitor Survey (October 2022).

¹² Id.

left for the day” or that “staff have been afraid of physical harm by a member, and we have given permission to certain staff to leave the teller area if certain members came in who had been abusive to that employee. It is a serious problem.”¹³

This is not an issue at one branch or in one region. It is a universal issue in the credit union industry and one that needs a real solution, now. At a time when all industries are experiencing labor constraints, it is imperative for credit unions to provide, at a minimum, a safe working environment. As discussed in the Harvard Gazette, it is “difficult to motivate talent to apply and bring them in. And then to retain them is harder, too. Lots of service organizations are facing turnover rates that are higher now than they were pre-pandemic.”¹⁴ If credit unions are unable, due to regulatory constraints, to tell their employees who have interacted with an abusive member, that they will never interact with that person at work again, those credit union employees will likely take a job in an industry where they feel protected.

Notice Process

The preceding discussion should illustrate the magnitude and urgency of the issue of problem members. It should also make clear that the current solutions are not equal to the task. So too, the very existence and passage of CUGMA should underscore the reality that the status quo is insufficient. Credit unions desperately need a solution that provides them with a streamlined, straightforward mechanism for expelling problem members that is cognizant of the unique and varied nature of the credit union industry. This proposal is not that solution.

The Board should consider removing any requirement in the proposed rule that is not found in CUGMA. Specifically, the proposal provides a member more time to request a meeting than is found in CUGMA. CUGMA states that “[a] member shall have 60 days from the date of receipt of a notification [of pending expulsion]...to request a hearing from the board of directors of the Federal credit union.”¹⁵ This is the only discussion of the hearing request found within the Act.

Yet the Board’s proposal confoundingly comes to the conclusion that:

“The member also has 60 calendar days to provide the FCU with their intent to have a hearing. Therefore, the member may mail the notice 60 days after the notice is received. As such, the FCU may not receive the notice within 60 calendar days.”

¹³ Id.

¹⁴ See Harvard Gazette, “Why all the abuse of servers, flight staffs, sales clerks as COVID rules ease?” (July 20, 2021) available at <https://news.harvard.edu/gazette/story/2021/07/harvard-business-professor-analyzes-bad-customers>.

¹⁵ 12 U.S.C. 1764 (2022).

CUGMA quite clearly states that the member shall request the hearing within 60 days. If the request has not been received by the credit union within those 60 days, then the request has not been made. Even the proposal uses the phrase “60 calendar days to provide the FCU with their intent.” Intent has not been *provided* if the request is still in the mail. Of course, the member is entitled to mail their hearing request on the 60th day after receipt of the notice of expulsion, but if the credit union has not received it on that 60th day, then the deadline has passed.

CUGMA places the burden of ensuring receipt of the notice of pending expulsion on the credit union, and it is only upon the member’s receipt of the notice that the 60 days begins to run. This is only fair, as a member who is unaware of proceedings against them cannot contest the allegations and mount a defense. But the same principles of fairness should require that once the notice has been received, the burden of ensuring receipt of the hearing request should shift to the member. Beyond being the logical process, it is the process spelled out in CUGMA and it is a process that places credit union and member on equal footing.

Finally, the proposed rule does not contemplate the possibility that it might be impractical to ensure that a problem member has received the notice, effectively stalling the expulsion process indefinitely. This could happen when a member to whom a notice of expulsion is being sent is either not home when delivery of the notice is attempted or when a member actively avoids receiving delivery of the notice. Certified Mail cannot be left unattended at a delivery location. If a valid recipient cannot confirm the delivery, the carrier will leave a note and keep the package. A problem member who spends under half the year at a residence other than their primary residence could be completely unaware that their credit union was seeking to expel them for months. A problem member who does not wish to be expelled could simply avoid accepting any mail in person and remain a member for years. While process servers and state marshals can be relied upon to serve court documents to sometimes unwilling recipients, they are not always successful, and the cost associated with their services is burdensome. This would be yet another example of misguidedly applying elements of due process to this contractual relationship.

Instead, in the final rule, the Board should state that the requirement for receipt of the notice of pending expulsion is satisfied if the credit union has a Certificate of Mailing from the United States Postal Service indicating that the notice of pending expulsion was mailed to the member’s primary address. Allowing this safe harbor would ensure that credit unions make genuine efforts to contact problem members and that a regulatory loophole does not inadvertently render the proposed rule ineffective.

Member in Good Standing and Limitation of Services

NAFCU supports the retention of the “Member in Good Standing” provisions of the FCU bylaws as this allows a credit union to utilize the limitation of services policy. NAFCU also supports removing the current definition of a “member not in good standing” as it would be made redundant by the list of prohibited conduct found in CUGMA. The Board should, as proposed,

define a member not in good standing as a member who has engaged in any of the conduct listed in CUGMA. Regarding the Board's proposed definition of dangerous or abusive behavior, NAFCU urges the Board to remove the statement providing that expressions of frustration with the FCU or its employees through elevated volume and tone or repeated interactions with employees are insufficient to constitute dangerous or abusive behavior. Depending upon the facts and circumstances, these behaviors may well constitute harassment or verbal abuse of credit union employees and a valid basis for restricting services. Harassment, by definition, involves repeated interactions. Stating that this conduct is not sufficient to constitute dangerous or abusive behavior undermines a credit union's ability to utilize the limitation of services policy to protect credit union staff from harassment and verbal abuse.

The Board should retain the limitation of services policy in the FCU Bylaws. NAFCU agrees with the Board's contention that including both the limitation of services and member expulsion authorities in the FCU Bylaws provides additional flexibility for FCUs to address certain disruptive member behaviors as they see fit. The proposed rule is intended to expedite the expulsion of problem members, however, the policy will not result in instantaneous expulsion, and the ability to limit the services of these members provides an important tool to address problem behavior in the near-term.

NAFCU also supports the removal of the requirement that the disruptive, violent, or abusive behavior of a member have a logical relationship between the objectionable activities and the services to be suspended. If a member has engaged in these types of acts, a credit union should have the ability to limit as many or as few of their services as it feels prudent.

Notice of Pending Expulsion

Regarding the content of the notice of pending expulsion, NAFCU recommends that the Board set clear guidelines for the content while allowing flexibility to apply the guidance. NAFCU recommends that the NCUA provide a template of a notice of pending expulsion that credit unions may rely upon as a framework for crafting their notice. Use of the template should provide certainty for credit unions that they are following the NCUA-approved process and serve as a safe harbor for compliance with the notice requirement.

Hearing

The language in CUGMA detailing the requirement for a hearing is as follows: "[t]he board of directors of the Federal credit union shall provide the member with a hearing." NAFCU appreciates the Board's recognition of the broad language included in CUGMA and its decision to avoid "prescriptive requirements related to the structure and procedure for the hearing."¹⁶ Further, in a footnote, the Board notes that "under federal law," the term "hearing" does not

¹⁶ 87 FR 59740 (October 2022).

necessitate a hearing held in-person.¹⁷ However, the Board is soliciting comments on whether the final rule should provide for a default mandate that FCUs provide in-person hearings, with limited exceptions. On this point, NAFCU and its members wish to be unequivocal: ***there must be no requirement for in-person hearings***. To require in-person hearings would be to render the final rule, and by extension CUGMA, essentially useless, as virtually no credit union would adopt the policy with such a requirement in place.

The proposal, while flexible in terms of hearing requirements, does not go far enough to ensure the safety of credit union staff and boards of directors. The final rule should allow FCUs, at the discretion of their boards of directors, to choose between in-person, virtual, and on-the-papers hearings, that is a hearing conducted by submission and consideration of written papers by the member. The proposed rule would require that the hearing must provide the member with an opportunity to present their case. The submission of written testimony is sufficient to provide this right. The boards of directors should be allowed to determine on a case-by-case basis, after evaluating the circumstances of the offending conduct, whether to offer one, two, or all three of the hearing options.

While NAFCU's members would prefer a policy in which any of the three hearing options is available in every expulsion case, at a minimum, the NCUA should provide the option for credit unions to offer hearings-on-the-papers in any expulsion case in which the member is alleged to have engaged in violent, threatening, abusive, or harassing behavior. Members who have engaged in this type of behavior in the course of an ordinary business day are not likely to behave more civilly in the context of a disciplinary hearing. If given the opportunity to spew invective in-person or virtually at the leadership of their credit union, these individuals are likely to take advantage. The Board recognizes this possibility and stated that they are "concerned that an in-person hearing may be problematic in cases of expulsion due to violence or threatened violence."¹⁸ While the Board uses this concern as justification for avoiding a requirement for in-person hearings, the possibility of threatened violence is just as likely during a virtual hearing. The Board should not require in-person or virtual hearings, especially in these instances.

Determination of violent, threatening, abusive, or harassing behavior

The determination of whether the conduct of the member constitutes violent, threatening, abusive, or harassing behavior should be left to the credit union's board of directors. Credit union boards of directors are best equipped to assess the level of threat that a problem member represents, and they should be trusted to determine what level of access that member should have in the hearing process. Additionally, while safety is the number one priority for all credit unions, size, space, and time considerations can make in-person, and sometimes virtual, member expulsion hearings impracticable. The presence of alternative forms of member expulsion

¹⁷ See Jeremy Graboyes, "Legal Considerations for Remote Hearings in Agency Adjudications, Administrative Conference of the United States" (June 2020).

¹⁸ 87 FR 59740 (October, 2022).

hearings, whether in-person, virtual, or written, would recognize that every credit union is unique and different circumstances call for different approaches.

Appeal

The final rule should not include an appeal right for members. The proposed expulsion process with a hearing is sufficient to provide members with an opportunity to explain their actions and defend themselves against any claims that they dispute. If, after the hearing, the board of directors still feels that the member's conduct warrants expulsion, then that decision should be respected. Furthermore, CUGMA makes no mention of a right to appeal, and the addition of such a step would prolong the expulsion process, counter to the language of the law and the intent of Congress.

Reinstatement

Finally, although CUGMA does include a process for reinstatement, it should be limited to the language of the law. CUGMA states "[a] member expelled under this subsection shall be given *an* [emphasis added] opportunity to request reinstatement of membership."¹⁹ The opportunity to request reinstatement is clearly given in the singular, and so the final rule should include only one opportunity for a member to request reinstatement. Any addition of a further right to reinstatement in the final rule would also diverge from the language of the statute and unnecessarily draw out a harmful relationship that a credit union seeks to end.

Tool of Last Resort

The expulsion of a credit union member is a serious matter and an action of last resort for credit union officials, as the expulsion of a member provides no benefit to the credit union other than protecting its staff and other members from a safety perspective. Furthermore, NAFCU's members have stated that generally, they do not foresee using this member expulsion process for losses to the credit union or more minor infractions. Rather, the majority of the individuals who will be subject to this expulsion process are those members who have engaged in behavior so extreme that it impinges on other credit union members' rights to access credit union services. The only reason that these members have not already been expelled is that the current process is so burdensome. So instead, these members, who have engaged in often abhorrent conduct, are left to linger on as members, perhaps with their services limited, to the benefit of neither the credit union, nor the problem member, nor the other members of the credit union.

Conclusion

NAFCU appreciates the opportunity to comment on this proposed rule. Credit unions and their members have suffered for too long under the tyranny of a minority of members who consider

¹⁹ 12 U.S.C. 1764 (2022).

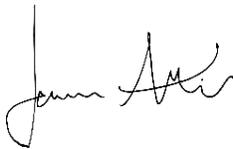
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themselves to be exempt from the basic standards of decency we expect from one another in a functioning society. NAFCU and its member credit unions advocated for years for a solution to this problem and finally saw a light at the end of the tunnel in the form of legislative action. It is now up to the Board to ensure that a real, workable solution is put into place. NAFCU urges the Board to recognize the difficult position that credit unions face in the absence of a functional member expulsion policy and issue a final rule that is flexible and easy to use. NAFCU requests that the Board adopt a realistic member expulsion policy that avoids overly burdensome requirements, provides clear guidelines, and prioritizes the safety and welfare of credit union staff and boards of directors. If you have any questions or concerns, please do not hesitate to contact me at 703-842-2268 or jakin@nafcu.org.

Sincerely,

A handwritten signature in black ink, appearing to read "James Akin". The signature is fluid and cursive, with a large initial "J" and "A".

James Akin

Regulatory Affairs Counsel